FILED BY CLERK
APR 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LORI S., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and SAMANTHA M., Appellees.	2 CA-JV-2009-0135 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-19158900

Honorable Karen S. Adam, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

Ronald Zack
Tucson
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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Lori S. is the mother of Samantha M., who was born in March 2009. Lori appeals from the juvenile court's order of November 30, 2009, adjudicating

Samantha dependent as to both of her parents following a two-day contested dependency hearing. On appeal, Lori challenges the admission into evidence of a report prepared in July 2009 by an investigator for the Child Protective Services division (CPS) of the Arizona Department of Economic Security (ADES). Without that report, she contends, the evidence was insufficient to support the court's finding of dependency. We affirm.

¶2 As defined in A.R.S. § 8-201(13)(a)(i), a dependent child includes one adjudicated to be "[i]n need of proper and effective parental care and control and . . . who has no parent or guardian willing to exercise or capable of exercising such care and control." The burden of proof in a dependency action is a preponderance of the evidence. *See* A.R.S. § 8-844(C)(1). On appeal, we view the evidence in the light most favorable to sustaining the juvenile court's findings, *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 376, 873 P.2d 710, 714 (App. 1994), and will not disturb a dependency adjudication unless no reasonable evidence supports it. *In re Maricopa County Juv. Action No. JD-500200*, 163 Ariz. 457, 461, 788 P.2d 1208, 1212 (App. 1989).

¶3 On July 22, 2009, CPS took Samantha into protective custody and placed her in foster care after she was treated at a local hospital for a broken femur that doctors suspected was not accidental in origin. Additional x-rays revealed the four-month-old infant also had older, healing fractures of at least two ribs. Her nineteen-year-old mother and twenty-one-year-old father told investigators Samantha had been exclusively in their care for the preceding week, and neither of them had any explanation for how her injuries had occurred.

¶4 A contested dependency hearing was held on November 16 and November 24, 2009. In its written ruling following the hearing, the juvenile court found the parents had "continuously denied knowledge of the 'mechanism' or cause of either injury" while

"repeatedly stat[ing] that the child was in their sole care and custody in the [two days] preceding the injury" to her leg. In concluding ADES had proven the allegations in its dependency petition by a preponderance of the evidence, the court wrote:

> The Court is not required to determine whether this injury was intentional or accidental. The parents have offered absolutely no explanation for how a four-month-old, non-ambulatory child sustained an impact injury to her left femur. Their failure to identify the mechanism of the injury indicates neglect at the very least, abuse at the very most, and certainly, ineffective care and control of this child.

¶5 In the first issue she raises on appeal, Lori cites a nonexistent rule of procedure, "Rule 16(f), Arizona Rules of Juvenile Procedure"—or, variously, "Rule 16(1)(f)"—to support her argument that it was error for the juvenile court to admit in evidence the CPS investigator's report prepared for the July 2009 preliminary protective hearing. Specifically, she contends the court erred in admitting it because the principal author of the report, Maria Szanto-Lindner, was not available for cross-examination at the dependency hearing in November. In a second, related argument, Lori contends the report contained factual inaccuracies and its admission violated her right to due process.

¶6 Presumably, the procedural rules to which Lori intended to refer are Rules 44 and 45, Ariz. R. P. Juv. Ct., cited in the juvenile court's preliminary protective hearing order. Rule 45(C) provides:

> **Admissibility of reports.** Prior to any dependency hearing, the court may review reports prepared by the protective services worker and shall admit those reports into evidence if the worker who prepared the report is available for cross-examination and the report was disclosed to the parties no later than:

1. One (1) day prior to the preliminary protective hearing; or

2. Ten (10) days prior to any other hearing.

As the exhibit itself reflects, the report was disclosed initially on July 30, 2009, so there is no issue of timely disclosure. And, as the court later noted, the report first was admitted in evidence at the preliminary protective hearing on July 31 and was reviewed by the court then.

¶7 In a joint pretrial statement filed on October 26, 2009, ADES listed among its exhibits "[a]ny and all" CPS reports. Maria Szanto-Lindner was not named in the list of witnesses, which did include "Edward Sheridan, CPS investigating supervisor," whose expected testimony included "foundational testimony for Child Protective Services Court Report."[1] Although Szanto-Lindner had been present at the preliminary protective hearing in July, by November, according to counsel for ADES, she no longer worked for CPS and had moved away from Arizona.

¶8 On the first day of the contested dependency hearing, the disputed report was admitted into evidence without objection. On the second day of the hearing, during her examination of Edward Sheridan, Lori protested that Sheridan lacked personal knowledge of the contents of the report and argued it should not be admitted unless Szanto-Lindner were made available to testify. The court overruled the objection, noting that the time for objections had passed and the report was already in evidence. Subsequently, Lori's counsel objected for the first time that admitting the report without giving her an opportunity to cross-examine Szanto-Lindner was a violation of due process.

[1]Sheridan had also signed and approved the report.

¶9 Rule 44(B)(2)(e) provides that specific objections to another party's exhibits, when not presented as prescribed by the rule, "shall be deemed waived, unless otherwise ordered by the court." In the joint pretrial statement filed on October 26, 2009, ADES provided Lori notice that it intended to reintroduce the report at the adjudication hearing and was planning to call only Sheridan, one of the two individuals who had signed the report, to testify at trial. Having objected neither in writing as Rule 44(B)(2)(e) contemplates nor orally when the report was offered in evidence, Lori waived her objections to the report. We therefore reject her assertion that the juvenile court "erred" in admitting the report in evidence. *See generally Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 19, 107 P.3d 923, 928-29 (App. 2005) ("A trial court has broad discretion in admitting or excluding evidence, and we will not disturb its decision absent a clear abuse of its discretion and resulting prejudice."). We find neither an abuse of the court's discretion nor a violation of Lori's right to procedural due process.[2]

¶10 In her remaining issue on appeal, Lori contends the evidence—without the CPS investigator's report—was insufficient to establish by a preponderance that Samantha was a dependent child, in need of proper and effective parental care and

[2]In complaining of "factual inaccuracies" and "misinformation" in the investigation report, Lori refers specifically to a statement the CPS investigator had attributed to Samantha's pediatrician, Pamela Villar, that "[the] doctor suspects drug use by the mother during pregnancy, and has concerns about the parent's care giving abilities." By questioning the ongoing CPS case worker about an entry in records CPS subsequently had obtained from Villar, Lori established at the adjudication hearing that Villar had no information that Lori had used drugs while she was pregnant and, moreover, that Villar had stated she "was never interviewed by anyone at CPS." Lori contends this "serious discrepancy" between Villar's written statement and the CPS report "taint[ed] the entire report and raise[d] questions about the skill, experience, and credibility of the case worker and her opinions." Although we agree the discrepancy is troubling, it ultimately has no bearing on the central reason for the juvenile court's finding of dependency—namely, the fact that a four-month-old infant had sustained broken ribs and a broken leg for which neither of her parents had any explanation.

control. The essence of her two-paragraph argument is that ADES had not taken adequate steps between July and November 2009 to determine whether Samantha might have the rare medical condition osteogenesis imperfecta, or brittle bone disease, which theoretically could afford some explanation for her several fractures.

¶11 The pediatric orthopedic surgeon who had treated Samantha's broken femur testified it was possible but unlikely that Samantha had the disorder, because "it's a very rare disease"; because she had not had other fractures of her extremities, in particular; and because her sclera were white and not blue. Lori presented evidence that Samantha's pediatrician, Pamela Villar, "agree[d] that testing for O[steogenesis] I[mperfecta] [wa]s a good idea" and that the ongoing CPS case worker had taken steps to arrange for Samantha to be seen by a geneticist. Lori suggests ADES did not meet its burden of proof because it had not yet excluded osteogenesis imperfecta as a possible cause of Samantha's injuries.

¶12 Although that testing had yet to be performed, the possibility that the child's broken bones ultimately might prove attributable, in whole or in part, to a rare medical condition did not preclude the juvenile court's finding that Samantha was a dependent child in need of proper care and protection. As Villar had written in a note contained in Samantha's medical records and admitted in evidence at the hearing, Samantha's "fractured femur and ribs are concerning [in] that [they] occurred while in the care of the parents with no explanation." And the fact Samantha previously had sustained two fractured ribs that her parents, at a minimum, had failed to detect or report further supports the court's finding of dependency.

¶13 In short, none of the arguments Lori advances on appeal addresses or undermines the juvenile court's central, unassailable conclusion: regardless of whether

Samantha's injuries had occurred accidentally or been inflicted intentionally, Lori's inability "to identify the mechanism [by which they occurred] indicates neglect at the very least, abuse at the very most, and certainly, ineffective care and control of this child." Consequently, because a preponderance of the evidence supports the court's factual findings, we affirm its order of November 30, 2009, adjudicating Samantha dependent.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge